SUPREME COURT, U. S.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

Office-Supreme Court, U.S.
FILED
FEB 3 1969
JOHN F. DAVIS, CLERK

No. 875

ARMEMENT DEPPE, S.A.; COMPAGNIE MARITIME BELGE (LLOYD ROYAL), S.A.; COMPAGNIE GENERALE TRANSATLANTIQUE; HAMBURG AMERIKA LINIE; NORDDEUTSCHER LLOYD; OZEAN/STINNES LINIEN; N.V. NEDERLANDISCHE-AMERIKAANSCHE STOOMVART-MAATSCHAPPIJ "HOLLAND-AMERICA LIJN"; SVENSKA AMERICA LINIEN; and WILHELMSEN LINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO GOVERNMENT'S OPPOSITION

GRAHAM & JAMES,
LEONARD G. JAMES,
F. CONGER FAWCETT,
310 Sansome Street,
San Francisco, California 94104,
Attorneys for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

CITATIONS

Cases

	Page
Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Lines, Inc., 10 F.M.C. ....., Pike & Fischer, Shipping Regulation Reports, 9 S.R.R. 662 (1967)	3
Empresa Hondurena de Vapores, S.A. v. McLeod, 300 F.2d 222 (2nd Cir. 1962)	5, 6
Foley Bros., Inc. v. Filardo, 336 U.S. 281, 93 L.Ed. 680 (1949)	4, 5
Lauritzen v. Larsen, 345 U.S. 571, 97 L.Ed. 1254 (1953)	5
Matson Navigation Co. v. Federal Maritime Commission, ... F.2d ....., Pike & Fischer, 8 S.R.R. 20,289 (9th Cir.; Dec. 18, 1968)	3
McCulloch v. Marineros de Honduras, 372 U.S. 10, 9 L.Ed. 2d 547 (1963)	5
Sociedad Nacional de Marineros de Honduras v. McCulloch, 201 F.Supp. 82 (D.D.C. 1962), *affirmed*, 372 U.S. 10 (1963)	5
United States v. Freeman, 239 U.S. 117, 60 L.Ed 172 (1915)	5
United States v. Pizzaruzzo, 388 F.2d 8 (2nd Cir. 1968)	7

Statutes

Public Law 87-346 (76 Stat. 762) ..... passim

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 875

ARMEMENT DEPPE, S.A.; COMPAGNIE MARITIME BELGE (LLOYD ROYAL), S.A.; COMPAGNIE GENERALE TRANSATLANTIQUE; HAMBURG AMERIKA LINIE; NORDDEUTSCHER LLOYD; OZEAN/STINNES LINIEN; N.V. NEDERLANDISCHE-AMERIKAANSCHE STOOMVART-MAATSCHAPPIJ "HOLLAND-AMERICA LIJN"; SVENSKA AMERICA LINIEN; and WILHELMSEN LINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO GOVERNMENT'S OPPOSITION

Throughout these proceedings it has been the government's reiterated tactic to set up, as petitioners' alleged "major argument," a spurious, straw-man position which petitioners themselves have never advanced. The government "wins" this self-created dialogue, at each successive

stage, thus depriving petitioners of a fair hearing on the real issues involved. It is time enough that one Court consider the position which petitioners *do* advance, uncolored by inflammatory and false attributions from the other side.

The government in its Brief in Opposition herein goes to great lengths (in fact, its entire first argument; pp. 8-9) to establish the proposition that Congress, in passing the "dual rate" legislation (P.L. 87-346), "intended to cover" "foreign-flag shipping lines" as well as American. Unquestionably this is true, and petitioners have at no point contended otherwise.

Indeed, each of these petitioner carriers is a member of at least several other conferences, in other U.S. trades, and a party to their "dual rate contracts," *where the contracts are executed and performed in the United States,* either with American shippers (exporters) or with American consignees (importers). These petitioners have not questioned and do not question the application of P.L. 87-346 to any of their contracts with American exporters and/or importers. This case, however, involves *only* contracts with *European exporters.* That is the subject of the dispute and there is no other.

The fundamental jurisdictional issue raised is not "who," but "where."

Our argument would be unchanged had the three American lines, former co-members of the defunct Continental-U.S.A. Gulf Westbound Freight Conference, chosen to remain in the suit. Barring some legal quirk (which the government has not to date advanced) dependent entirely on those lines' U.S. identity and hence,

somehow, allegiance, it would remain our position that the "dual rate contracts" here in dispute remained beyond the jurisdiction and the intent of the United States Congress to control, in view of their execution and performance entirely outside the United States and the lack of any "reprehensible effect" in the United States. The foreign-flag nature of all nine of the petitioning lines heightens, to be sure, the extraordinary presumption of the Justice Department's extraterritorial claim. But no more. It is not the touchstone of the controversy.

It is not without significance that the Federal Maritime Commission—the very agency charged with the administration of the same Shipping Act of which the "dual rate" provisions are a part—has recently drawn precisely the same territorial regulatory line which petitioners urge here, and, significantly, against the loud protestations of the same Department of Justice, raising in that case an argument rather the converse of that which it invokes here. In a decision issued October 3, 1967, the Maritime Commission proclaimed, under Section 15 of the Act, jurisdiction over corporate mergers in the shipping industry. *Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Lines, Inc.*, 10 F.M.C. ...., Pike & Fischer, Shipping Regulation Reports, 9 S.R.R. 662 (1967). This assumption of jurisdiction was squarely sustained by the U.S. Court of Appeals for the Ninth Circuit a short month ago (though the case was remanded on other, subsidiary grounds). *Matson Navigation Co. v. Federal Martime Commission*, ... F.2d ....., Pike & Fischer, 8 S.R.R. 20,289 (9th Cir.; Dec. 18, 1968).

As an intervenor in both Commission and Court, the Department of Justice argued, against merger jurisdiction in the Commission, that since the literal terms of the statute cover foreign carriers as well as American, without distinction, yet since admittedly the Commission could not control mergers between foreign-flag operators, it necessarily followed that Congress had not intended to embrace merger agreements within Section 15, at all. The Commission rejected the argument, declaring:

> "But, say the parties, therein lies the fatal flaw in our reasoning because the language of Section 15 makes no distinction by flag or nationality among carriers subject to its requirements, and if we read into it such a distinction, we are doing violence to its very language and to our own principle that we regulate without regard to flag.
>
> "Section 17 from whence we draw our power to regulate the practice of terminals makes no distinction between domestic terminals and foreign terminals and a literal reading of the section would apply it to both. Yet, it has never been applied to a foreign terminal to exercise regulatory supervision over that terminal's practices. Nor is it likely that it would be. A reasonable construction of Section 15 would normally exclude foreign mergers from the coverage of its provisions just as it would include domestic mergers." 9 S.R.R. at 668.

The principle of statutory construction thus followed by the Commission, in acknowledging implied limitations on its jurisdiction, to reach agreements and activities consummated in the United States only, is firmly settled in decisions of this Court, and lower courts in conformance with them. See, for but some examples, *Foley Bros.*,

Inc. v. Filardo, 336 U.S. 281, 285, 93 L.Ed. 680 (1949); *McCulloch v. Marineros de Honduras,* 372 U.S. 10, 9 L.Ed. 2d 547 (1963); *Empresa Hondurena de Vapores, S.A. v. McLeod,* 300 F.2d 222 (2nd Cir. 1962); *Sociedad Nacional de Marineros de Honduras v. McCulloch,* 201 F.Supp. 82 (D.D.C. 1962), *affirmed,* 372 U.S. 10 (1963); also *Lauritzen v. Larsen,* 345 U.S. 571, 578, 97 L.Ed. 1254 (1953); *United States v. Freeman,* 239 U.S. 117, 119, 60 L.Ed. 172 (1915).

In the *Foley* case, *supra,* this Court denied the application of the U.S. "Eight-Hour Law" to work performed abroad, *even though* the work was performed under a contract with the U.S. government (a circumstance not present here). In the *McCulloch* cases, this Court and the lower courts of two Circuits reaffirmed the time-honored doctrine of forbearance in areas of maritime jurisprudence, set down in *Lauritzen v. Larsen,* against seeking to force one nation's parochial views on activities consummated wholly "outside the dominions of the sovereign power enacting" (345 U.S. at 578). Stated the Second Circuit, in language highly relevant to the government's contention here:

> "Literally the words cover the case. Yet the Board would hardly insist that the words apply to everything within their literal reach; we have not heard it suggested that the Board considers its power to extend to the stevedores who load Empresa's ships in Honduras although they are engaged in 'commerce' quite as much as the seamen who man them. Neither do we suppose the Board would think it could direct an election among miners employed by a wholly owned subsidiary of an American company abroad, even though the ore was shipped to the United States

> and American employees of the parent were objecting to what they regarded as unfair wage competition arising from lack of effective organization among the foreign miners, although again the words literally apply. Words are not thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage." *Empresa Hondurena de Vapores, S.A. v. McLeod,* 300 F.2d at 231.

In *United States v. Freeman, supra,* this Court sustained a statute making it a punishable offense to "ship or cause to be shipped from one state, . . . into any other state, . . . or from a foreign country into any state," any package containing intoxicating liquors, unless clearly marked as prescribed in the statute. It recognized that to save the single, unitary statute, the verb "to ship" must be given a different interpretation than its ordinary one—"to deliver to a carrier for shipment"—reasoning as follows:

> "The statute deals with shipping liquor from a foreign country into a state, as well as with shipping it from one state into another state. It puts both upon the same plane and makes them equally criminal. Whatever marks the completion of the offense in one likewise marks it in the other. If it be delivery to the carrier in the case of interstate shipments, it equally is this delivery in the case of shipments from a foreign country. *And yet all will concede that Congress did not intend to do anything so obviously futile as to denounce as criminal an act wholly done in a foreign country, such as the delivery to the carrier where the shipment is from a foreign country into a state.*" 239 U.S. at 120 (emphasis added).

No such need—nor room—for an unnatural construction of the word "tender," in the petitioners' dual-rate contracts with their customers in Europe, exists in this case; the words of the contract are unambiguous and clear in their meaning and intent. By the same token, P.L. 87-346 is fully enforceable, without need for a strained construction, as to all such contracts executed in the United States—whether in import or export trades. Notwithstanding, it is precisely the "obviously futile" construction for which the government contends here, where the contracts concerned cover only "tender" of cargo at European ports.

The controlling law laid down by this Court was reviewed and summarized recently by Senior Circuit Judge Medina in *United States v. Pizzaruzzo,* 388 F.2d 8 (2nd Cir. 1968). There Judge Medina noted the firmly settled law, in American jurisprudence, against the application of an American penal statute to foreign transactions that have no "detrimental effect" in the United States.

It is therefore not a question here whether P.L. 87-346 regulates foreign carriers, but rather, whether it regulates *the particular conduct* of foreign carriers *involved in the complaint,* namely, innocuous commercial transactions executed and performed wholly outside the United States.

A one-page second argument of the government's Brief follows the line of the Circuit Court below, in rejecting the clear language of the contracts here concerned, and the necessarily limited scope of their coverage, and of the rights and obligations thereunder. We have devoted considerable space in our Petition to the error of this strained reading, in fact, and error of the consequent

reasoning, in law; and to that will only add one final observation. The government's argument that what is "really" the "main purpose" of the contracts is to "secure transportation of the goods to the United States" overlooks the fact that what is being *punished* here is not the "transportation," nor even the "securing" of transportation, but simply the *terms of the tender* of cargo, abroad.*

It is, we submit, long past time that this case be decided on the true facts and issues which are genuinely presented; not on some extraneous red-herring issues dragged inappropriately in by the heels. Petitioners have not yet been heard on the bona fide issues in the case, principally because of the government's obscuring of them with false issues. The case is one of great international consequences. It should not be concluded on patently erroneous factual propositions.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GRAHAM & JAMES,

LEONARD G. JAMES,

F. CONGER FAWCETT,

Attorneys for Petitioners.

January, 1969

*The "dual rate contract" expires, by its own express terms, once shipper's tender and carrier's assignment of the lower freight rate has been accomplished. At that point, as pointed out in our Petition, other shipping documents and other contractual commitments take over.